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Case No. 82-6080

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

THOMAS A. BAREFOOT,

Petitioner,

v.

W. J. ESTELLE, JR., Director,

Texas, Department of Corrections

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

BRIEF OF AMICI CURIAE STATE OF FLORIDA, ET AL

JIM SMITH
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QUESTION PRESENTED

WHAT IS THE APPROPRIATE STANDARD FOR GRANTING OR DENYING STAY OF EXECUTION PENDING DISPOSITION BY FEDERAL COURT OF APPEALS OF APPEAL BY DEATH-SENTENCED FEDERAL HABEAS CORPUS PETITIONER?

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This brief is submitted by the State of Florida and joined by the following states:

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Arkansas	Attorney General J. Steven Clark

Colorado	Attorney General Duane Woodard
Delaware	Attorney General Charles M. Oberly, III
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INTEREST OF AMICI CURIAE

The above listed states, through their attorneys general, respectfully offer this brief in support of Respondent W. J. Estelle, Jr., Director, Texas Department of Corrections. The Amici will all be affected by the decision of this case since each of the states represented by the respective attorneys general are states which have enacted the death penalty. Each has or will be plagued by requests for last minute stays of scheduled executions and each has a legitimate interest in the finalty of its judgments.

SUMMARY OF ARGUMENT

A stay of execution should not be granted by a Court of Appeals unless the death sentenced habeas petitioner demonstrates through an appropriate detailed application for stay that he has a substantial federal question in which he has a fair likelihood of success.

The fact that a certificate of probable cause has been granted by either a District or Circuit Judge should not suffice to dispense with this requirement. As this court has recognized, despite issuance of a certificate, an appeal may be frivolous. Comity and interests in finalty require that requested stays of valid state court judgments should be denied except for compelling reasons.

If no certificate of probable cause is issued then the death sentenced habeas

petitioner is not entitled to an appeal and no stay should be granted. If, however, one has issued, this should not call for an automatic stay of the state judgment. By requiring the habeas petitioner to file a sufficiently detailed application for stay demonstrating a likelihood of success, a court of appeals will be compelled to follow the precepts of *Garrison v. Patterson*, 391 U.S. 464, that is, determine whether there is a likelihood of success, and if not, summarily decide the appeal.

Compliance with the limited briefing, allowed a petitioner under *Garrison* once a certificate of probable cause is granted, would be met by the requirement of a detailed application for stay setting out the issues and reasons why petitioner believes there is a likelihood of success.

By virtue of its decision in the instant case, so announcing this requirement, all future death sentenced petitioners will be thereafter on notice that after a death warrant is signed or execution date is otherwise set, opportunity to address the merits on appeal will or may be limited if they, unnecessarily, wait until the last minute within which to seek habeas relief.

ARGUMENT

A FEDERAL APPEALS COURT SHOULD DENY A MOTION FOR STAY OF EXECUTION UNLESS A DEATH SENTENCED PETITIONER DEMONSTRATES THAT HIS APPEAL PRESENTS A SUBSTANTIAL FEDERAL QUESTION IN WHICH HE HAS A FAIR LIKELIHOOD OF SUCCESS.

In *Brooks v. Estelle*, 51 L. W. 3469 Justices Brennan, Marshall and Stevens, dissenting, opined that whenever a certificate of probable cause is issued a stay of execution should inexorably follow. With deference, amici submit that this is an improper criterion for determining whether a stay of execution should be granted. We will suggest what we believe should be a proper standard. But first we will point out why we believe that the issuance of a certificate of probable cause should not be the gauge by which a federal appellate court determines whether to issue a stay of execution in a death case.

THE CERTIFICATE OF PROBABLE CAUSE

The function of a certificate of probable cause is to allow an appeal to proceed where the detention complained of arises out of process issued by a State Court. Title 28 U.S.C. §2253, Federal Appellate Rule 22, *Nowakowski v. Maroney*, 368 U.S. 542 (1967). The function of a stay is to hold in abeyance the judgment and sentence of the state court.Title 28 U.S.C. §2251. Thus it is in the nature of a preliminary injunction *Mulligan v. Zant*, 531 Fed. Supp. 458 U.S.D.C.M.D. Ga. 1982). If issuance of a certificate were the correct gauge by which to determine whether to stay the judgment of a state court then all habeas petitioners would be entitled to release from custody pending their habeas appeal.

It is one thing to grant a certi-

ficate and thus allow an appeal where the appeal is not frivolous or totally without substance, *Alexander v. Harris*, 595 F. 2d 87 (2nd Cir. 1979); quite another, to enjoin a state judgment or sentence simply because a certificate has issued. Respectfully, we suggest that while a certificate of probable cause is supposedly not granted where the appeal is frivolous or without substance [1] all too often, in practice these

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1 Apparently this Court has not spoken on the question as to what is probable cause for the issuance of a Certificate and all too often they have been issued routinely or simply because the appeal is not frivolous. Allowance of In Forma Pauperis Appeals in §2255, and Habeas Corpus cases by Justice, then Judge Blackmun, 43 F.R.D. 343. Were this Court to address this broader question and restrict this issuance to a much greater degree than is now the practice (such as only upon a showing of a substantial federal question upon which

certificates are issued perfunctorily. Fed. R. App. P. 22 requires the District Judge to state the reasons why a certificate should not issue. It is far easier for a busy District Judge to grant a certificate than to issue an order detailing why one should not be granted. We do not imply a cavalier attitude on the part of judges in issuing certificates of probable cause. What we do say is that the system

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appellant might well prevail) it would, we submit come closer to the Congressional intent in enacting Title 28 U.S.C. §2253, greatly reduce the number of frivolous appeals, and provide the opportunity for more thoughtful analysis of those remaining. But, that is not the question upon which the Court granted certiorari. Resolution of the standard for issuance of a certificate of probable cause requires amplifications beyond the scope of the instant question.

and the realities of life encourage issuance of certificates to the point where they are routinely granted irrespective of the lack of merit to the appeal. 2/

In fact, this Court has recognized that despite the issuance of a certificate of probable cause, an appeal may be frivolous, *Carafas v. LaValle*, 391 U. S. 234, 242 (1968). This recognition is the first step towards the realization

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2/ Moreover, Fed. R. App. p. 22 (b) provides that if no express request for a certificate is filed, the notice of appeal is a sufficient request addressed to the judges of the Court of Appeals (which may be considered by a Circuit Judge). We fail to see how a Circuit Judge can determine whether or not an appeal is meritorous or frivolous simply by a review of the notice. Should issuance of a stay of execution rest on such a procedure?

that, in practice, certificates of probable cause impede rather than advance the quest for an end to ligation. This is because although an appeal from a denial of a petition for writ of habeas corpus is not a right [as in a direct criminal appeal, Fed. R. App. P. 4(b)], once a certificate of probable cause is granted, the appeal cannot be dismissed as frivolous. It must be considered on it's merits. *Carafas* supra, *Nowakowski*, *Garrison* infra. Thus, although collateral in nature, habeas appeals enjoy even greater protection than direct appeals in criminal cases, which may be dismissed because frivolous. *United States v. Rogers*, 481 F. 2d 896 (5th Cir. 1973) cert. denied.

Comity and federalism require more deference to state court judgments than is being afforded by such a system. After

all, federal habeas is not, as some would have us believe, an extension of the state appellate system. Stays of state court processes are seldom part of the criminal justice system and should not be made compulsory or automatic by a procedure which holds them in such little regard. As observed in *Mulligan v. Zant*, supra:

> "Petitioner is not justified in presuming that such a drastic measure as staying an order of a state court of competent jurisdiction will be a natural course of events simply because he is attacking a sentence of death."
>
> (Text 459)

For a District Judge to issue a certificate of probable cause ". . . solely for the purpose of allowing the petitioner to proceed through the appellate process . . ." without regard to likelihood of success or merit to

the appeal [as occurred in *Dobbert v. Wainwright*, 532 F. Supp. 545, 563 (1982)], to be inexorably followed by a stay, is to invite unnecessary friction between the states and federal courts. This friction is exacerbated when the Court of Appeals grants a stay even before the District Judge has finished with the case as occurred in *Ford v. Strickland*, Case No. 81-6663-Civ. NCR, United States District Court, Southern District of Florida, as evidenced by the following excerpt from the Court's Oral Findings of Fact and Conclusion of Law (unpublished):

> "I have disussed the matter with a judge in the Eleventh Circuit, advised him after everything was done here and I had arrived at a conclusion what my conclusion was. He said, we will give you time to announce your findings and conclusions from the bench, and then in order to permit the Defendant to receive an effective appellate review they would enter a stay. Ap-

> parently, that may well have been done. And the execution scheduled for tommorrow morning, I'm advised, has been stayed by the Eleventh Circuit. And the burden is upon the Attorney General's Office of the State of Florida to notify the warden of that. It is not on this Court. They made it abundantly clear the Court of Appeals, that this administrative matter had to be carried out because they were concerned that if they issued the stay after 5:00 o'clock, they might have some difficulty in making sure that the stay were effectively communicated, and that, of course, the Attorney General's Office can do, and I direct that you do that."

Or, as occurred in *Goode v. Wainwright*, 670 F. 2d 941 (11th Cir. 1982) not only was that particular execution stayed but in effect all death cases down the line were held in abeyance simply because the appellate court was critical of the District Court's reliance on District Court decisions which were currently pending appeal in the Eleventh Circuit —— all of which unanimously held

the issue to be without merit. Compare: *Rosota v. Warden, California State Prison*, 391 U.S. 543 (1963), Harlan, J. (pendency, on certiorari, of an issue does not necessarily justify delaying state judgment.)

We recognize that this Court has held that once a habeas petitioner persuades an appropriate tribunal that probable cause for appeal exists he must be afforded an opportunity to address the underlying merits, *Nowakowski*, supra, *Garrison v. Patterson*, 391 U.S. 464 (1968), but in *Garrison* this Court also stated:

> "As we only recently noted in Carafas v. LaValle, 391 US 234, at 242, Nowakowski does not prevent the courts of appeals from adopting appropriate summary procedures for final disposition of such cases. Carafas requires the courts of appeals to give sufficient indication that an appeal has been disposed of on the merits, but nothing in Nowakowski and nothing we say here prevents the courts of appeals from considering the questions of prob-

> able cause and the merits together, and nothing said there or here necessarily requires full briefing and oral argument in every instance in which a certificate is granted. We hold only that where an appeal possesses sufficient merit to warrant a certificate, the appellant must be afforded adequate opportunity to address the merits, and that if a summary procedure is adopted the appellant must be informed by rule or otherwise, that his opportunity will be limited. Within this general framework, the promulgation of specific procedures is a matter for the courts of appeal."
>
> (391 U.S.446-447)

Consequently, while a habeas petitioner may persuade a District Judge to issue a certificate of probable cause it does not necessarily follow that because the certificate was granted that there is a high or even fair likelihood that the habeas petitioner will be successful in his appeal. It may be entirely possible for a court of appeals to fully consider the merits of the appeal through a sum-

mary proceeding without the necessity of issuing a stay of execution. In most death cases the issues have been throughly briefed time and again at state court and District Court level. Little more should be required of an appellate court after a review of the proceedings below in order to approve the District Judge's findings and conclusions.

It is manifest then, that even after a certificate of probable cause has been granted, a stay of execution should not automatically follow. A court of appeals should make an independent examination to determine the need for a stay of the state court judgment.

THE PROPER STANDARD

What then is the proper standard that a circuit court of appeals should apply in determining whether to grant a stay of execution?

A proper standard is one which demonstrates a deference for the state court judgment and at the same time assures that all meritorious appeals are considered to the extent necessary to assure that no sentence of death is imposed in violation of the constitution.

Since, as we have suggested, a stay is in the nature of a preliminary injunction the same considerations generally should be given to it. In passing upon whether to issue a stay in a death case, the Fifth Circuit recently set out what must be considered in determining whether to grant a stay:

> "(1) whether the movant has made a showing of likelihood of success on the merits, (2) whether the movant has made a showing of irreparable injury if the stay is not granted, (3) whether the granting of the stay would substantially harm the other parties, and (4) whether the granting of the stay would serve the public interest."
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> * * * * * * * * * *
>
> "While "the movant need not, always show a 'probability' of success on the merits," he must "present a substantial case on the merits when a serious legal question is involved and show that the *balance of the equities,* [i.e., the other three factors] *weighs heavily in the favor of granting the stay."*
>
> *O'Bryan v. Estelle*, 691 F. 2d 706,708 (5th Cir. 1982)

We most respectfully submit that the Fifth Circuit comes closer to espousing the correct standard. It recognizes the national policy of forbidding federal courts from enjoining state proceedings except under special circum-

stances, *Younger v. Harris*, 401 U.S. 37 (1971), by requiring some showing of probability of success not unlike what is required for bail pending habeas review. *Aronson v. May*, 85 S. Ct. 3, 13 L. Ed. 2d 6 (1964), *Calley v. Callaway*, 496 F. 2d 701 (1974). In *Aronson*, Mr. Justice Douglas opined as follows:

> Second: This applicant is incarcerated because he has been tried, convicted, and sentenced by a court of law. He now attacks his conviction in a collateral proceeding. It is obvious that a greater showing of special reasons for admission to bail pending review should be required in this kind of case than would be required in a case where applicant had sought to attack by writ of habeas corpus an incarceration not resulting from a judicial determination of guilt. Cf. Yanish v. Barber, 97 L. Ed. 1637, 73 Sup. Ct. 1105 (1953). In this kind of case it is therefore necessary to inquire whether in addition to there being substantial questions presented by

> the appeal, there is some circumstance making this application exceptional and deserving of special treatment in the interests of justice. See Benson v. California, 328 F. 2d 159 (CA 9th Cir. 1964). The papers before me on this application indicate the existence of no such circumstance."

Indeed, it is similar to the standards followed by the Justices of this Court in determing whether to grant a stay of a state court judgment pending application for certiorari. As Mr. Justice Powell stated in *White v. Florida*, 73 L. Ed 2d 1385, 1386(1982):

> "[T]here must be a reasonable probability that four members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari or the notation of probable jurisdiction; there must be a significant possibility of reversal of the lower court's decision; and there must be a likelihood that irreparable harm will result if that decision is not stayed." Times-

Picayune Publishing Corp. v. Schulingkamp, 419 US 1301, 1305, 42 L. Ed 2d 17, 95 S.Ct. 1 (1974) (Powell, J. in chambers).

(Emphasis Supplied)

If a certificate of probable cause is not granted then, of course, the habeas peititioner is not entitled to an appeal and no consideration need be given as to whether or not to grant a stay. If, however, one is granted be it by a District or Circuit Judge that should not end the inquiry with respect to holding the state judgment in abeyance.

While, as we have suggested, the Fifth Circuit's standard comes closer to being the correct one, we submit it does not go far enough. It implies that simply because a substantial federal question is presented a stay should be granted.

It fails to recognize that an appeal may present a substantial federal question yet likelihood of success be minimal at best. For example, consideration of a Fourth Amendment question may be precluded by *Stone v. Powell*, 428 U. S. 465 (1976) or a Fifth Amendment one by *Wainwright v. Sykes*, 433 U. S. 72 (1977). An appealing habeas petitioner should be required to petition for a stay setting forth the question presented and the reasons why his appeal not only raises a substantial federal question, but that he has at least a fair likelihood of success.

If the appealing habeas petitioner fails to carry his burden of demonstrating a fair likelihood of success the court of appeals should deny the stay and proceed in the summary fashion suggested in *Garrison*, supra.

While *Garrison* prounounces that even when a court of appeals proceeds in a summary fashion ". . . the appellant must be afforded adequate opportunity to address the merits . . .", it also specifically states that neither full briefing nor argument is required in order to afford this opportunity. What then is sufficient briefing to satisfy *Garrison* ? We submit it is such as calls to the appellate court's attention the issues presented with some supporting argument. An application for stay that sets out the issues to be raised on appeal and attempts to demonstrate a likelihood of success would, we suggest, suffice. From such an application a court of appeals can determine not only likelihood of success, but, additionally, if success is unlikely, the merits of the appeal.

Garrison also requires notice to the appellant that his opportunity to address the merits will or may be limited. If this Court holds as we suggest, and so announces, that *Garrison* requirement will have been met. Thereafter all death sentenced prisoners will be on notice that after a death warrant is signed or an execution date is otherwise set opportunity to address the merits on appeal will or may be limited, depending on their demonstrating a likelihood of success. This will encourage those with valid claims to proceed expeditiously and not wait until the eleventh hour to seek habeas relief.

There may be situations where time does not permit a detailed application and because of "hydraulic pressures" *Evans v. Bennett*, 440 U.S. 1301, (1979) (Renquist J.) imposed upon it, a Court

of Appeals may find it impossible to make its determination as to likelihood of success in the time remaining between the application and scheduled execution. In such circumstances, it would probably be appropriate to grant a temporary stay.

But the stay should be of the most temporary nature, only so long as it is absolutely necessary to allow a detailed application for stay and for the court of appeals to decide the basic question involved i. e. whether there is a sufficient likelihood of success in the appeal to grant the appellant a further stay pending full appellate review. If the appealing habeas petitioner fails to demonstrate a likelihood of success the federal court of appeals should dissolve its temporary stay and proceed in the summary fashion suggested in *Garrison*.

One further comment with respect to *Garrison*. The problem with *Garrison* is that while it provides a general framework for Courts of Appeal to proceed summarily, even when a certificate or probable cause has been granted, it does not compel a Court of Appeals to do so. 3/ Consequently, once a certificate

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3/ In fact since Garrison was decided in 1968, there appears to be only two circuits that have utilized its suggested procedure, the Fifth Circuit in the instant case and the Tenth Circuit in *Green v. Turner*, 409 F. 2d 215 (1969).

has been granted a full appeal must be afforded unless the Court of Appeals decides to proceed as *Garrison* suggests. Unless a Court of Appeals so decides a stay will inevitably follow. But, by having the issuance of the stay dependent, not upon the granting of a certificate (as freely as they are granted) but upon a proper application for stay, as we have suggested, a Court of Appeals will properly be compelled to apply the guidelines of *Garrison* in all capital cases whenever time is of the essence.

This standard which amici espouse is particularly appropriate with respect to successive petitions for writs

of habeas corpus. 4/ Anyone that does not recognize that death row inmates have and will file successive and last minute habeas petitions is simply whistling in the wind. These last minute petitions are purposely lenghthy, confusing, vague and complex with little regard to merit, designed to bring about the "hydraulic pressures" about which Mr. Justice Rehnquist lamented in *Evans v. Bennett*, supra and thus cause a last minute stay. The filing of a successive petition together with its eleventh hour timing should be considered to weigh heavily against the petitioner and require him to show an even greater likelihood of success.

4/ Bailey v. Oliver, 695 F. 2d 1323 (1983) 11th Cir., an example of the abuses that can arise through successive petitions for writs of habeas corpus. In Bailey, a non-capital case, a single circuit judge granted a certificate of probable cause for the third time.

CONCLUSION

The practice which has thus far evolved in many circuits of granting stays of execution simply to give the habeas petitioner his desired appeal, is in need of drastic curtailment by this Court. There have been only two involuntary executions in this country since this Court upheld the constitutionality of the death penalty in 1976, attributable in substantial part to the present system. While what Amici suggest may not totally solve the problem of a constitutionally valid punishment being obstructed by endless procedural delays, it will at least eliminate some of the most egregious abuses.

Respectfully Submitted,

JIM SMITH
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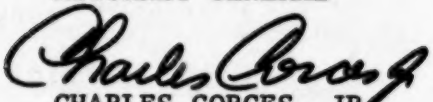

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CERTIFICATE OF SERVICE

I, CHARLES CORCES, JR., Counsel for Amici and a member of the Bar of the United States Supreme Court, hereby certify that on the 29 day of March, 1983, I served three copies of this Brief of Amici Curiae on William Gray, Esquire, Attorney at Law, 2038 Lexington Avenue, Houston, Texas, 77098, counsel for Petitioner Barefoot and three copies of this brief of Amici Curiae on Douglas Becker, Assistant Attorney General, State of Texas, P. O. Box 12548, Austin, Texas, 78711 by a duly addressed envelope with postage prepaid.

Charles Corces, Jr.
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